



*C.R.P(MD)No.1739 of 2024*

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**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**DATED : 31.07.2024**

**CORAM:**

**THE HONOURABLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY**

**C.R.P(MD)No.1739 of 2024**

**in**

**C.M.P(MD)No.10042 of 2024**

Abdul Kuthus (Died)

1.Kamaal Batcha

2.Hairunisa Beevi

3.Abdul Munab

... Petitioners/Respondents/Defendants

vs.

1.Shanthi

2.Valarmathi

... Respondents/Petitioners/Plaintiffs

**Prayer:-** Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the Fair and Decreetal order dated 03.06.2024 in I.A.No.7 of 2024 in O.S.No.42 of 2015 on the file of the Additional District Munsif Court, Lalgudi.

For Petitioners : Mr.P.Thiyagarajan

**ORDER**

The Civil Revision Petition is filed challenging the fair and decreetal order dated 03.06.2024 in I.A.No.7 of 2024 in O.S.No.42 of 2015 on the file of the Additional District Munsif Court, Lalgudi.



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2.The said order, permits the plaintiffs to withdraw the suit with liberty to file a fresh suit on the same cause of action. On a perusal of the affidavit filed in support of the application, the plaintiffs have pleaded that the extent with reference to the suit property was wrongly mentioned in the suit. There are also other errors in the pleading made in the plaint. Therefore, they want to withdraw the suit with liberty to file the suit on the same cause of action.

3.The learned counsel for the petitioners submits that when the suit was filed in the year 2015, it is now sought to be withdrawn in the year 2024 after a lapse of nine years. The defendants would be put to grave prejudice on account of such an action. The plaintiffs by giving such permission, the suit, which would be otherwise barred by limitation would now be saved. It is his further contention that the plaintiffs traced title to the suit property from their father as well as another third person, namely, their paternal uncle, Muthu. Thereafter, upon realizing that the suit is untenable, they sought to amend the said paragraph of the plaint by removing the name of the paternal uncle. The trial Court considered that would change the very claim of the plaint and the very nature of the suit itself and therefore, the amendment was disallowed. Therefore, what was



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not permitted by the Court directly, now is sought to be achieved indirectly by withdrawing the suit by mentioning it as a typographical error with liberty to file a fresh suit. The learned counsel would also rely upon the judgment of the Hon'ble Supreme Court of India in ***K.S.Bhoopathy and Ors. Vs. Kokila and Ors.*** reported in **2000 (5) SCC 458**.

4.I have considered the said submissions made by the learned counsel for the petitioners and perused the material records of the case.

5.As far as the refusal of the amendment is concerned, when the plaintiffs have pleaded the title in respect of the schedule property by mentioning an extent of the property and pleading that they got title both from their father as well as their paternal uncle, then if they want to change that, definitely that alters the nature of the suit and therefore, any amendment which alters the nature of the suit cannot be permitted. Therefore, the amendment was rightly refused. As far as the withdrawal of the suit with liberty to file a fresh suit is concerned, the question before the Court is that whether the withdrawal would be permissible with liberty as within the parameters of under Order 23 Rule 1(3) (a) or (b) of CPC. That is, whether the plaintiffs are pleading any formal defect or whether the



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reasons mentioned by the plaintiff for sufficient reasons. It can be firstly seen that even while the refusal of the amendment, the plaintiffs have made a plea in the civil revision petition that he must atleast be permitted to withdraw the suit and file the fresh suit, as the defendants are contending that correction of mistake alters the nature of the suit. This Court had directed that as and when such an application is filed, the same will be considered.

6.In that background, if the averments which are made in the application in support of the prayer is considered, firstly, the plaintiffs want to give up some of the extent and restrict their claim to some of the extent only. They also state that even the said extent is not properly described. Thus, the said defects can very well be termed as formal defects. The learned counsel for the petitioners take exception to the second paragraph in the affidavit that the other errors, namely, the pleading of the plaintiffs that they derived title from the paternal uncle sought to be now swept under the carpet by terming it as a typographical error which should not be permitted. This Court agrees with the learned counsel for the petitioners that any substantial error cannot be swept under the carpet of typographical error. Now, therefore, it has to be seen that whether the



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plaintiffs can wriggle out of such an averment made in the plaint. After a pleading which is taken in the plaint, subsequently, if the plaintiffs thereafter comes before the Court and says that by mistake he made the plaint and therefore, permit him to withdraw the suit and file a fresh plaint with correct averments, I am of the view that such a permission can be granted, especially in the instant case, where in the earlier round, while considering the amendment itself, this Court had observed that as and when such an application is filed for withdrawal of the suit, the same shall be considered in accordance with law. The trial Court also relied upon the judgment of the Hon'ble Supreme Court of India in ***V.Rajendran and another Vs. V.Annasamy Pandian (Died) through legal representatives Karthyayani Natchiar*** reported in **2017 SCC (5) 63**, whereunder the Hon'ble Supreme Court of India, has said that the term formal defect should be liberally construed. In any event, in this case, it is not the case of the defendants that any answer has been elicited in the cross examination or any finding that is given by the trial Court. Therefore, when no substantial prejudice is shown to the defendants permitting the plaintiffs to withdraw and file a fresh suit cannot be faulted with. The next contention of the learned counsel for the petitioners is with reference to limitation. In this regard, it is appropriate to extract Order 23 Rule 2 which state as



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follows:

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***"Order XXIII: Withdrawal and Adjustment of suits:***

***.....Rule (2) -Limitation law now affected by first suit.-***

*In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted."*

7. Therefore, merely because permission is granted to institute a fresh suit on the same cause of action, the limitation will be calculated only from the date of the institution of the second suit and the grant of permission will not cause any prejudice to the petitioners/defendants in the present case. Therefore, that will answer the grievance of the petitioners that nine years after the filing of the suit, the plaintiffs are withdrawing and seeking permission. The plaintiffs are seeking permission at their own risk. Therefore, I am of the view that no grounds are made out to interfere with the order of the trial Court in allowing the interlocutory application and with the above observations, the Civil Revision Petition is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

**31.07.2024**

NCC : Yes / No  
<https://www.mhc.tn.gov.in/judis>



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To

The Additional District Munsif Court, Lalgudi.



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**D.BHARATHA CHAKRAVARTHY, J.**

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